NUR HIDAYAH SALAHUDDIN v. DEPARTMENT OF SOCIAL WELFARE & ANOR

HIGH COURT MALAYA, ALOR SETAR
CHAN JIT LI JC
[CRIMINAL APPEAL NO: 41H-15-05-2017]
9 AUGUST 2018

CHILDREN & YOUNG PERSONS: *Guardianship – Placing child in custody of fit and proper person – Mother appealed against decision of Court for Children awarding custody of child to guardian – Whether mother deprived of counsel – Whether there was procedural non-compliance – Whether there was wrongful appreciation of facts – Whether order ought to be in child's interest – Child Act 2001, ss. 18, 19(2), 30(1)(b)*

This was an appeal against the order of the Court For Children made pursuant to s. 30(1)(b) of the Child Act 2001 ('the Act'). The appellant was the biological mother of the child ('mother'). The mother was a friend of the daughter of the second respondent ('guardian'), the person who was awarded custody of the child by the Court for Children. The background facts were that the mother had made a decision to live with the guardian in Alor Setar for a trial period of time together with the child. Thereafter, the mother decided to seek employment in Kuala Lumpur and the child was left in the guardian's care. The appeal record showed that the child was first brought before the Magistrate on 22 February 2017 with the guardian. The protector had appeared before the Magistrate and applied for an order under s. 19(2) of the Act. The Magistrate granted the application resulting in the child being placed in the temporary custody of the guardian ('the first order'). On 22 March 2017, the mother and the guardian appeared before the Court For Children. The proceedings were adjourned on the request of the guardian, contending that the protector's report had just been served and the guardian disputed some parts of the report. On 29 March 2017, the parties appeared before the Court For Children and just as the previous date, the mother was unrepresented. The court proceeded with the hearing. After hearing the mother, the maternal grandmother, the guardian and the guardian's witnesses, the court made an order for the child to be placed in custody of a fit and proper person, which was the guardian, for three years under s. 30(1)(b) of the Act. The biological mother was given unlimited visitation rights to the child for the said three years under s. 30(8)(b) of the Act. Hence, the present appeal. The issues that arose were (i) whether the mother was deprived of a right to counsel; (ii) whether there was procedural non-compliance; (iii) whether inadmissible evidence was admitted; and (iv) whether there was wrongful appreciation of facts.

Held (dismissing appeal):

(1) The mother had not identified the welfare officer that had allegedly advised her that it was unnecessary to engage a counsel. The purported allegations by the mother were mere statements by counsel from the Bar and such statements carried no weight. It is trite that the right to counsel is a basic legal right. However, the court's failure to inform the mother of her right to counsel was not fatal. It is a normal practice for courts to fix mention dates for litigants to engage a counsel. This is to ensure the smooth administration of judicial proceedings. This practice could not amount to a legal obligation (paras 11 & 12)

(2) The first order that the court issued was premised on s. 19. The protector had brought the child before the Magistrate and sought a temporary order under s. 19(2)(b). This provision must be read together with s. 18. The said provisions clearly vest in the protector the powers to determine whether a child needs care and protection. Once the protector makes that determination, the protector is duty bound to produce the child before the Court For Children within 24 hours. In the event that the protector is unable to comply with this time requirement, as it so appeared in this case, the protector must produce the child before a Magistrate. The Magistrate then exercises her discretion to determine whether to place the child in a safe place or direct that the child be placed in the care of a fit and proper person pending the child's appearance at a Court For Children. This order was interim in nature as opposed to the final order which could only be made by a Court For Children. (paras 14 & 15)

(2a) It was not the Magistrate who concluded that the child was abandoned or needed care and protection. That determination had been made by the protector. And as the Magistrate did not make any findings in respect of the child being abandoned, she could not be said to have committed a procedural error. Further, in the notice of appeal, the mother had identified the order against which she was appealing. That order was the order of 29 March 2017 and that order was the final order which the Court For Children made. The mother's argument on procedural non-compliance, however, was an attack on the first order granted on 22 February 2017 of which no appeal had been filed. Thus, the mother's argument on procedural non-compliance must fail.

(3) The Court For Children was mindful of the fact that its order would not be in the mother's interests. However, under the prevailing circumstances, the court prioritised the child's interests above all. The court's election of priorities was in consonance with the requirement of s. 30(5). There was no error on the part of the court. There was a thorough and correct appreciation of both facts and law. In addition to that, in making the order under s. 30(1) (b) that the child be placed in the care of the guardian for a period of three years, the court had

preserved the mother's interests. The court did so by directing that the mother be granted unlimited access to the child. This unlimited access will give the mother bonding time with the child so that she may be able to rebuild their relationship after the long separation and before she re-assumes custody of the child after the expiry of the three years. This decision was a wholesome decision.

Legislation referred to:
Child Act 2001, ss. 17(1)(e)(ii), 19(2)(b), 30(1)(b), (5), (6), 95

For the appellant - Ahmad Faris Khairudin; M/s Khairudin & Co
For the 1st respondent - Asma Ibrahim & Julaila Jamaludin; SFCs
For the 2nd respondent - Tengku Hezrul Anuar Tengku Abdul Samad; M/s Tengku Hezrul & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Chan Jit Li JC:

[1] This is an appeal against the order of the Court For Children sitting in Alor Setar. The order appealed against was made pursuant to s. 30(1)(b) of the Child Act 2001. (Hereinafter to be referred to as 'the Act'). Section 30(1)(b) of the Act provides as follows:

> **Powers of the Court For Children**
>
> 30(1) If a Court for Children is satisfied that any child brought before it under section 19 or 25 is a child in need of care and protection, the Court for Children, after taking into consideration that it is desirable to place a child in a family-based care, may -
>
> (a) …
>
> (b) make an order placing the child in custody of a fit and proper person for a period specified by the Court For Children.
>
> (c) …

[2] The appellant, Nur Hidayah binti Salahuddin, is the biological mother of the child. (Hereinafter to be referred to as 'the mother'.)

[3] The first respondent is the Welfare Department whilst the second respondent, Nooraziah binti Zainol Abidin, is the person who was awarded custody of the child by the Court For Children. (Hereinafter to be referred to as 'the guardian'.)

[4] Puan Julaila binti Jamaluddin, learned counsel for the first respondent, raised a preliminary objection stating that this appeal cannot proceed by way of a criminal appeal. I do not propose to dwell in detail her submission as I am of the view that the preliminary objection is without merit. It is evident from s. 95 of the Act that an appeal against any finding or order of the Court For Children shall be by way of a criminal appeal to the High Court. Section 95 reads as follows:

Appeals

95(1) The Public Prosecutor or any child or his parent or guardian, if aggrieved by any finding or order of a Court For Children may appeal to the High Court against such finding or order in accordance with the provisions of the Criminal Procedure Code relating to criminal appeals to the High Court from a Magistrate's Court.

(2) …

[5] The factual background of this appeal in brief is as follows. The child was born on 6 March 2014. The father identified in the birth certificate is one Muhamad Fikri bin Muhamad Affandi. The father has not made an appearance either at the Court For Children or at the High Court. Apparently, the parents of the child were divorced prior to the institution of court proceedings.

The mother is a friend of the guardian's daughter. She (the mother) made a decision to live with the guardian in Alor Setar for a trial period of time together with the child. Thereafter, the mother decided to seek employment in Kuala Lumpur and when she went, the child was left in the guardian's care.

[6] The appeal record shows that the child was first brought before the learned Magistrate on 22 February 2017. The guardian, but not the mother, was present with the child. The protector identified as one En. Chamnong a/l Supak had appeared before the learned Magistrate, one Puan Noor Farah Hazwani binti Osman, and applied for an order under s. 19(2)(b) of the Act. Section 19(2)(b) reads as follows:

Production before Court For Children

19(1) Subject to section 20, every child who is taken into temporary custody under section 18 shall be brought before a Court For Children by a Protector within twenty-four hours exclusive of the time necessary for the journey from the place the child was so taken into custody to the Court For Children.

(2) If it is not possible to bring a child before a Court For Children within the time specified in subsection (1), the child shall be brought before a magistrate who may direct that the child be temporarily placed in:

(a) a place of safety or centre; or

(b) the care of a fit and proper person,

until such time as the child can be brought before a Court For Children.

…

The learned Magistrate granted the application resulting in the child being placed in the temporary custody of the guardian. (Hereinafter to be referred to as 'the first order.')

[7] On 22 March 2017, the parties, that is to say, the mother, the guardian and the guardian's counsel appeared before the Court For Children. The proceedings were adjourned on the request of the guardian's counsel. The learned counsel had contended that the protector's report had just been served on him and the guardian disputed some parts of the report. The basis for the adjournment appears as follows:

> Mahkamah membenarkan penangguhan permohonan ini berdasarkan kepada seksyen 30(10) Akta Kanak-Kanak 2001 yang mana Mahkamah memberikan hak untuk didengar kepada ibu kanak-kanak, orang yang layak dan sesuai serta saksi-saksi yang lain untuk memberikan keterangan.

This goes to show that the court was aware of whose interests it should consider before making a final order.

[8] On 29 March 2017, the parties appeared before the Court For Children. Just as the previous date (22 March 2017), the mother was unrepresented. The court proceeded with the hearing. After hearing the mother, the maternal grandfather, the guardian and the guardian's four other witnesses, the court made the following pronouncement:

> Dengan ini Mahkamah membuat suatu perintah untuk meletakkan kanak-kanak di dalam jagaan seorang yang layak dan sesuai iaitu Nooraziah binti Zainal Abidin kp 631003-02-5846 selama 3 tahun di bawah s. 30(1)(b) Akta Kanak-Kanak 2001. Ibu kandung kanak-kanak diberi hak untuk melawat kanak-kanak tanpa had tempoh masa selama tempoh 3 tahun tersebut di bawah s. 30(8)(b) Akta Kanak-Kanak 2001.

Hence, the present appeal by the mother.

[9] En Ahmad Faris bin Khairudin ('En Faris'), the learned counsel for the appellant, submitted that this appeal will be confined to the following four grounds:

(i) that the mother was deprived of a right to counsel;

(ii) that there was procedural non-compliance;

(iii) that inadmissible evidence was admitted; and

(iv) that there was wrongful appreciation of facts.

[10] On the first issue, En Faris submits that it is undisputed that the mother was not represented by counsel at the Court For Children. He submits that the court had failed to advise and inform the mother of her right to counsel. The court's failure to do so, the learned counsel submits, is fatal and a valid ground for the High Court to set aside the order of the Court For Children. En Faris further contends that a welfare officer had informed the mother that it was unnecessary for her to engage a counsel. All that was necessary was that she appears at the hearing. In addition to these, it is alleged that the Court for Children had told the mother that she should be grateful to the guardian for taking care of her child. En Faris further submits that had the mother been duly represented, the guardian could have been

A cross-examined by the mother's counsel more especially so when the guardian's application for custody and care of the child had caught everyone by surprise.

[11] I find the submissions to be without merit both on facts and law. Firstly, the purported allegations by the mother are mere statements by
B counsel from the Bar. The statements were made by a counsel who was not present at the lower court proceedings. Such statements from the Bar carry no weight. I note too that the mother has not identified the welfare officer or the said person who had allegedly advised her that it was unnecessary to engage a counsel. Neither is her allegation against the court substantiated as
C there is nothing to this effect in the appeal record prepared by her counsel. And, the guardian's interest in this matter obviously cannot constitute a surprise for she was the catalyst for this proceeding.

[12] It is trite that the right to counsel is a basic legal right. But with the greatest of respect, I am unable to accede to En Faris's argument that the
D court's failure to inform the mother of her right to counsel is fatal. By his argument, En Faris is asking this court to read into the right to counsel a corresponding legal duty on the courts to inform litigants of this right. It is a normal practice for courts to fix mention dates for litigants to engage a counsel. This is to ensure the smooth administration of judicial proceedings.
E This practice cannot amount to a legal obligation. En Faris, in response to my question, concedes that he is unable to produce any legal authority, be it statutory or judicial pronouncements, in support of his argument. I believe this is so for the simple reason that there is none.

[13] On the issue of procedural non-compliance, En Faris submits that the
F Court For Children committed a further error in concluding that the child had been abandoned within the confines of s. 17(1)(e)(ii) of the Act. Section 17(1)(e)(ii) reads as follows:

Meaning of child in need of care and protection

G 17. (1) a child is in need of care and protection if:

(a) …

…

(e) the child:

H (i) …

(ii) has been abandoned by his parent or guardian and after reasonable inquiries the parent or guardian cannot be found.

…

I En Faris submits that the mother had not abandoned the child but had left the child in the guardian's care for the purpose of seeking employment in Kuala Lumpur. Again, I find this submission to be without merit for the following reasons.

[14] The first order that the court issued was premised on s. 19. As stated above, the protector had brought the child before the Magistrate and sought a temporary order under s. 19(2)(b). For completeness, this provision must be read together with s. 18. Section 18(1) provides as follows:

> **Taking a child into temporary custody**
>
> 18(1) Any Protector, Assistant Protector or police officer who is satisfied on reasonable grounds that a child is in need of care and protection may take the child into temporary custody, unless the Protector, Assistant Protector or police officer is satisfied that:
>
> (a) the taking of proceedings in relation to the child is undesirable in the best interests of the child; or
>
> (b) the proceedings are about to be taken by some other person.

[15] The provisions clearly vest in the protector the powers to determine whether a child needs care and protection. Once the protector makes that determination, the protector is duty-bound to produce the child before the Court For Children within 24 hours. The 24-hour period runs from the time the protector takes the child into temporary custody but shall exclude travelling time. In the event that the protector is unable to comply with this time requirement, as it so appears in this case, the protector must produce the child before a Magistrate. The Magistrate then exercises her discretion to determine whether to place the child in a safe place or direct that the child be placed in the care of a fit and proper person pending the child's appearance at a Court For Children. This order is interim in nature as opposed to the final order which can only be made by a Court For Children.

[16] En Faris's argument on procedural non-compliance must fail for two reasons. Firstly, it was not the learned Magistrate who concluded that the child was abandoned or needed care and protection. That determination had been made by the protector. In this case, it was the said En Chamrong. And, as the learned Magistrate did not make any findings in respect of the child being abandoned, she cannot be said to have committed a procedural error.

[17] The other point worthy of note is that in the notice of appeal, the appellant had identified the order against which she is appealing. That order is the order of 29 March 2017 and that order is the final order which the Court For Children made. The appellant's argument on procedural non-compliance, however, is an attack of the first order granted on 22 February 2017 of which no appeal had been filed.

[18] This leaves me with issues (iii) and (iv). I shall deal with both issues together as they are inter-connected. Seven witnesses appeared at the hearing before the Court For Children. The mother and the child's maternal grandfather testified. The second respondent also testified together with four others. In the course of the hearing, the second respondent alleged that the mother had social and moral problems including her (the mother) sexual orientation. In support of her allegations, the second respondent had

produced several photographs and screenshots which En Faris submits were inadmissible. The learned counsel further submits that there was insufficient evidence to substantiate the second respondent's allegations.

[19] A perusal of the grounds of judgment will show that the Court For Children did not premise its decision on this issue. In compliance with s. 30(6) of the Act, the court considered the protector's report. The provision of s. 30(6) reads as follows:

> **Powers of Court For Children**
>
> 30(1) If a Court For Children is satisfied that any child brought before it under section 19 or 25 is a child in need of care and protection, the Court For Children, after taking into consideration that it is desirable to place a child in a family-based care, may:
>
> (a) …
>
> (b) make an order placing the child in the custody of a fit and proper person for a period specified by the Court For Children.
>
> …
>
> (6) before making an order under subsection (1) or (4), the Court For Children shall consider and take into account any report prepared by the Protector which:
>
> (a) shall contain such information as to the family background, general conduct, home surrounding, school record and medical history of a child as may enable the Court For Children to deal with the case in the best interests of the child, and
>
> (b) …

[20] Two reports were tendered in this case. One of the reports was prepared by one En Azli bin Aziz. He is the protector for the District of Johor Bahru ('Pelindung Kanak-Kanak Daerah Johor Bahru'.) This report of 13 March 2017 is entitled 'Laporan Sosial Ibu Kandung'. The other report dated 21 March 2017 was prepared by one En Mohd Sabri bin Saad. (Hereinafter to be referred to as 'Alor Setar report.') En Mohd Sabri bin Saad is the protector for the District of Kota Setar ('Pelindung Daerah Kota Setar, Kedah Darul Aman').

[21] The court observed that neither report proposed that the child be returned to the mother. The Johor report recommended that the child be returned to the maternal grandfather. The Alor Setar report proposed that the child should continue to be in the guardian's care. The court then went on to decide as follows:

> [2] …
>
> Mahkamah merujuk lampiran dokumen sokongan yang menyatakan laporan social datuk kandung kanak-kanak yang mana tiada satu laporan menyatakan kanak-kanak pernah dipelihara oleh datuk kandung sejak kanak-kanak dilahirkan. Mahkamah berpendapat di atas dasar

kepentingan utama kanak-kanak itu sendiri adalah tidak wajar untuk meletakkan kanak-kanak kepada datuk kandung kerana kanak-kanak itu tidak pernah dibesarkan atau dipelihara oleh datuk kandung sejak dilahirkan dan Mahkamah melihat kepada aspek kasih sayang dalam menentukan kepentingan utama kanak-kanak itu.

[3] … Mahkamah merujuk kepada kes di atas bahawa kanak-kanak itu sejak lahir sudah berada di dalam lingkungan keluarga orang yang layak dan sesuai dan pertukaran kepada suasana tersebut sekiranya diserahkan kepada datuk kandung adalah sesuatu yang bertentangan dengan kepentingan utama kanak-kanak itu sendiri. …

[4] … Mahkamah telah menilai kelakuan 'conduct' kanak-kanak itu semasa di dalam kamar bahawa kelakuan kanak-kanak cenderung untuk memilih kepada ibu pelihara dan kanak-kanak berasa takut dan mula menangis apabila ditinggalkan tanpa kehadiran orang yang layak dan sesuai. …

Mahkamah berpendapat bahawa kelakuan 'conduct' ini membantu Mahkamah dalam menentukan kepentingan utama 'the best interest of the child' pada masa ini dan hadapan untuk kanak-kanak berasa selamat, emosi yang tidak terganggu dan jaminan kasih sayang daripada orang yang berada di sekelilingnya. …

Mahkamah berpendapat dengan melihat kelakuan kanak-kanak itu sendiri dapat Mahkamah membuat kesimpulan siapa yang kanak-kanak pilih untuk tinggal bersama dan memberi jaminan kepada kanak-kanak. Mahkamah melihat emosi kanak-kanak yang menangis dan takut ditinggalkan oleh orang yang layak dan sesuai adalah emosi yang jelas daripada seorang kanak-kanak untuk terus berada disamping orang yang layak dan sesuai.

…

Mahkamah merujuk kepada kes di atas, kepentingan utama kanak-kanak adalah pertimbangan utama sekalipun keputusan Mahkamah tidak menyebelahi ibu kandung kanak-kanak serta datuk kandung kanak-kanak.

[5] … Mahkamah juga menimbangkan pendapat penasihat Mahkamah Bagi Kanak-Kanak yang berada di dalam prosiding pendengaran perintah dan bersama dengan Mahkamah bagi menasihati dan membantu Mahkamah dalam membuat keputusan perintah. …

Penasihat Mahkamah Bagi Kanak-Kanak berpendapat adalah wajar kanak-kanak ditempatkan dibawah orang yang layak dan sesuai iaitu Nooraziah binti Zainal Abidin memandangkan kanak-kanak telah biasa tinggal bersama orang yang layak dan sesuai serta demi kepentingan kanak-kanak tersebut. Penasihat Mahkamah Bagi Kanak-Kanak juga memohon untuk Mahkamah mempertimbangkan bahawa ibu kanak-kanak tidak layak untuk menjaga kanak-kanak serta datuk kandung tidak pernah memelihara kanak-kanak sejak kecil. Faktor ini juga Mahkamah perlu mempertimbangkan dalam mencapai keputusan demi kepentingan utama kanak-kanak.

A Mahkamah berpendapat bahawa di atas alasan-alasan di atas perintah Mahkamah meletakkan kanak-kanak di bawah orang layak dan sesuai iaitu Nooraziah binti Zainal Abidin adalah keputusan yang munasabah dan wajar selaras dengan 'the best interest of a child' kanak-kanak tersebut.

B **[22]** The Court For Children was mindful of the fact that its order would not be in the mother's interests. However, under the prevailing circumstances, the court prioritised the child's interests above all. The court's election of priorities was in consonance with the requirement of s. 30(5) which provides as follows:

C **Powers of Court For Children**

30(1) If a Court For Children is satisfied that any child brought before it under section 19 or 25 is a child in need of care and protection, the Court For Children, after taking into consideration that it is desirable to place a child in a family-based care, may:

D …

(5) In determining what order to be made under subsection (1), the Court For Children shall treat the best interests of a child as the paramount consideration.

E **[23]** I am unable to see any error on the part of the court. There was a thorough and correct appreciation of both facts and law. In addition to that, in making the order under s. 30(1)(b) that the child be placed in the care of the guardian for a period of three years, the court had preserved the mother's interests. The court did so by directing that the mother be granted unlimited access to the child. This unlimited access will give the mother bonding time

F with the child so that she may be able to rebuild their relationship after the long separation and before she re-assumes custody of the child after the expiry of the three years. In short, this decision is a wholesome decision. It must be affirmed. The appeal is, accordingly, dismissed.

G

H

I